STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT THOMAS CROUCHMAN
And SUSAN CROUCHMAN, his wife,

Plaintiff,

No. 127871

vs

MOTOR CITY ELECTRIC COMPANY,
A Michigan corporation, and
CITIZENS INSURANCE COMPANY OF AMERICA,
A Michigan corporation,
Defendants

Court of Appeals
No. 248419

Wayne Circuit Court
No. 01-112063-NI

and

KEVIN JAMES WIECZOREK,
Defendant, Third Party Plaintiff-Appellee

v

127871

AUTO-OWNERS INSURANCE COMPANY,
Correctly identified as
HOME-OWNERS INSURANCE COMPANY,
Third Party Defendant Appellant

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APPELLEE'S SUPPLEMENTAL

BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED FROM

Third Party Defendant Appellant Auto-Owners Insurance Company, also known as Home-Owners Insurance Company, seeks leave to appeal from the decision of the Court of Appeals entered October 28, 2004. Reconsideration was denied December 13, 2004.

QUESTION PRESENTED FOR REVIEW

I. DOES PART 1.a OF SECTION IV OF AUTO-OWNERS' POLICY CREATE THREE ALTERNATIVE PATHS TO COVERAGE WHERE IT USES A DISJUNCTIVE TO SEPARATE THE THREE CONDITIONS THAT CREATE COVERAGE?

Appellant insurer says: NO

Appellee insured says: YES

The Court of Appeals answered: YES

II. UNDER BASIC DEFINITIONS AND RULES OF GRAMMAR, IS THE WORD "OR" IN AUTO-OWNERS' POLICY A CONJUNCTION THAT CONNECTS THE TERMS?

Appellant insurer says: YES

Appellee insured says: NO

The Court of Appeals answered: NO

III. DOES AUTO-OWNERS' INTERPRETATION MAKE SOME LANGUAGE MEANINGLESS?

Appellant insurer says: NO

Appellee insured says: YES

The Court of Appeals did not address this question

IV. SHOULD LEAVE BE GRANTED TO INTERPRET LANGUAGE, WHERE THE ALLEGED PROBLEM FACED BY THE INSURER CAN BE RESOLVED BY RE-WRITING THE POLICY?

Appellant insurer says: YES

Appellee insured says: NO

The Court of Appeals did not address this question

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SUMMARY OF ARGUMENT

This appeal involves an issue of how a specific phrase in an automobile policy issued by Auto-Owners should be interpreted. The interpretation in the Court of Appeals opinion is consistent with standard English rules of grammar and definition.

In addition, this appeal does not involve any issue of broad public significance, because if the Court of Appeals' interpretation of the specific policy language is allowed to stand, Auto-Owners will simply revise the policy language to say what Auto-Owners claims the policy means.

On the other hand, if this Court grants leave and then adopts Auto-Owners' interpretation, it will be treating as materially equivalent two constructions that are actually entirely different. Auto-Owners' argument is that the formulation "not A or B or C" is identical in meaning to "neither A nor B nor C." In fact, they are virtual opposites: "or" is a simple disjunctive, while "neither . . . nor" is a conjunction.

Under ordinary rules of grammar, the formula "a vehicle **not** owned **or** furnished **or** made available" means "a vehicle not owned, a vehicle not furnished, or a vehicle not made available." This is distinct from the use of the formula "neither . . . nor," which, applied to this phrase, results in "a vehicle **neither** owned **nor** furnished **nor** made available."

It is for Auto-Owners alone to devise a formulation that says what it claims it meant. There are many ways that Auto-Owners could have done so and can do so if the opinion of the Court of Appeals stands. These are outlined in the below in the argument.

But if this Court adopts, either explicitly or by implication, a principle that the formulation "not A or B or C" is identical to these others, that principle will necessarily be applied to other policies, with results that are unpredictable.

MATERIAL PROCEEDINGS AND FACTS

The statement of facts in Appellee's principal brief is included here for convenience of reference.

Accident Facts

This case involves issues of coverage under an insurance policy. The issues arise out of a motor vehicle accident on April 10, 2001. Robert Crouchman alleged that Defendant-Appellee Kevin Wieczorek drove negligently and rear-ended him. Mr. Wieczorek was driving a vehicle that was owned by his employer, Motor City Electric.

Insurance Policies

Mr. Wieczorek was insured under a personal policy issued by Auto-Owners. Mr. Wieczorek's employer, Motor City Electric, was insured by Reliance Insurance Company. Reliance became insolvent after the accident. Under the Michigan Property and Casualty Guaranty Act, MCL 500.7901 *et seq.,* the Michigan Property and Casualty Guaranty Association is an entity responsible for administering claims of insolvent insurers. "An insured of an insolvent insurer can look to the MP&CGA for coverage only if there is no other insurance company to turn to for coverage." *Auto Club Ins Assn v Meridian Mutual Ins Co,* 207 Mich App 37; 523 NW2d 821 (1994). Mr. Wieczorek, by a third-party action, sought a declaration that he was insured under his personal automobile policy issued by Auto-Owners.

Auto-Owners Coverage Extension

Section IV of the Auto-Owners policy contains extensions of coverage.

SECTION IV – INDIVIDUAL NAMED INSURED

If the first named insured in the Declarations is an individual and the automobile described in the Declarations is a private passenger automobile the following extensions of coverage apply:

1. LIABILITY COVERAGE – BODILY INJURY AND PROPERTY DAMAGE

a. The Liability Coverage provided for your automobile (that is not a trailer) also applies to an automobile (that is not a trailer) not:

(1) owned by or furnished or available for regular use to you . . .

* * *

b. We extend this coverage only:

(1) to you;

* * *

c. We do not cover:

(1) the owner of the automobile (that is not a trailer).

(2) an automobile used in your business or occupation or that of a relative, unless it is:

(a) a private passenger automobile; and

(b) used by you . . ..

(Exhibit A)

Trial Court Motions

Third Party Plaintiff Wieczorek and Third Party Defendant Auto-Owners filed cross motions for summary disposition. The hearing was held on January 3, 2003. The trial court took the matter under advisement and issued a letter opinion on January 13, 2003, holding that Auto-Owners' extension of coverage in Section IV (exhibit A) applied to Mr. Wieczorek's use of his employer's vehicle.

Court of Appeals Affirmance

Auto-Owners appealed as of right and the Court of Appeals affirmed. Auto-Owners filed a timely motion for reconsideration, which was denied, and has now filed an application for leave to appeal to this Court.

ARGUMENT

I. PART 1.a OF SECTION IV CREATES THREE ALTERNATIVE PATHS TO COVERAGE.

This Court's order of September 29, 2005 invites supplemental briefs directed to the question whether "there is coverage where the automobile involved in the accident is not owned by the insured but is furnished to or available for regular use by the insured." This is a reference to part **a** of the clause (exhibit A), in which this language (minus references to trailers) appears:

> SECTION IV – INDIVIDUAL NAMED INSURED
>
> If the first named insured in the Declarations is an individual and the automobile described in the Declarations is a private passenger automobile the following **extensions** of coverage apply:
>
> 1. LIABILITY COVERAGE – BODILY INJURY AND PROPERTY DAMAGE
>
> a. The Liability Coverage provided for your automobile also applies to an automobile **not**:
>
> (1) owned by **or** furnished **or** available for regular use to you . . .
>
> (Emphasis added)

The critical language consists of two dozen words:

> The Liability Coverage provided for your automobile also applies to an automobile **not**:. . .owned by **or** furnished **or** available for regular use to you . . .
> (Emphasis added)

The language of the policy controls, and there are two distinct but complementary approaches to the analysis of the text. One is a grammatical approach, in which words are analyzed by their lexical definitions and their functions as parts of speech. The other is a broader linguistic approach, in which this text is subjected to a comparative analysis, *i.e.,* compared to other formulations that express the idea that the insurer claims it "intended" by the text it actually used. This brief will apply each of these.

To take the comparative analysis first, there is a broad choice of language that would state clearly what Auto-Owners claims its policy means.

Auto-Owners' own application for leave to appeal demonstrates this at pages x-xi of the Statement of Grounds for Appeal, where Auto-Owners argues that under the language quoted above, the policy "does not cover the insured's use of her employer's vehicle that is regularly furnished or available for her use, even if the insured does not own that vehicle" (Auto-Owners' Application pp x-xi, emphasis added).

If we take the words underlined above, and move them from Auto-Owners' brief into the policy, the operative language would read:

> The Liability Coverage provided for your automobile also applies to an automobile not:. . .owned by you, but not to an automobile that is regularly furnished or available for your use by your employer. . .

This simple exercise makes three points. First, Auto-Owners cannot achieve the result it wants with the language it used. Auto-Owners can only express its argument by converting the structure of "not . . . or . . . or . . ." into something that approaches ordinary usage, using "but not" to establish an exception (regularly furnished vehicles) to the broad extension of coverage (non-owned vehicles).

The second point is that the limitation in Auto-Owner's hypothetical language for employer owned vehicles is precisely what the policy does when section **a** and section **c** are read together.

The third and broadest point this makes is that it would not have been difficult for Auto-Owners to actually **say** what it claims its words **mean**. In fact, it would have been easier. There are any number of formulations that would accomplish this.

A. Replace Disjunctive "Or" With Negative Conjunction "And Not."

One example of language that would have been better is:

> The Liability Coverage provided for your automobile also applies to an automobile that is not:. . .owned by you, and is not furnished and is not available for your use. . .

This language itself is somewhat awkward, but it has this advantage over Auto-Owners actual language: It uses the conjunctive "and" to link all three alleged requirements, rather than using the disjunctive "or." This is also the closest transliteration of what Auto-Owners says its clause means, because Auto-Owners' analysis requires that the disjunctives "or" be converted into negative conjunctions "and not."

B. Replace Disjunctive "Or" With Subordinating Conjunction "Except."

A **second example** that is also better than the actual language, is:

> The Liability Coverage provided for your automobile also applies to an automobile that is not. . .owned by you, except for an automobile that is furnished or available for your use. . .

This language is also a bit awkward, because the phrase "except for" could be improved upon. Still, it makes clear the relationship between non-owned vehicles and furnished vehicles that Auto-Owners claims is expressed by the two disjunctives "or," because "except" means "with the exclusion of; other than; but."[1] *American Heritage Dictionary,* Third Edition, p 638 (exhibit B).

C. Replace Disjunctive "Or" With Subordinating Conjunction "But."

A **third example** would use the subordinating conjunction "but":

> The Liability Coverage provided for your automobile also applies to an automobile that is not. . .owned by you, but not to any automobile that is furnished or available for your use. . .

---

[1] "Except," which functions as a subordinating conjunction here, is sometimes treated as a preposition, for purposes of making a following pronoun take the objective case, as in "No one except me reads grammar books for fun."

This example is better, because it uses conventional "carve-out" language, in common use in the industry and readily accessible to lay persons. A variant would be to use the phrase "but not if that automobile . . ."""

> The Liability Coverage provided for your automobile also applies to an automobile that is not. . .owned by you, but not if that automobile is furnished or available for your use. . .

D. Replace Disjunctive "Or" With Subordinating Conjunction "Unless."

A **fourth example** would use the single word "unless":

> The Liability Coverage provided for your automobile also applies to an automobile that is not. . .owned by you, unless that automobile is furnished or available for your use. . .

"Unless," which is itself one of the definitions given for "except," is defined as "Except on the condition that; except under the circumstances that." AHD at 1955 (exhibit C).

These various examples all use language that makes clear that the first requirement (non-ownership), is **linked** to and **subordinated** to additional requirements rather than **separated from** them. Again, "or" is a disjunctive and in ordinary usage establishes three separate conditions, not three linked conditions.

E. Replace Disjunctive "Or" With Negating Conjunction "Neither . . . Nor."

A **fifth example** does the best job of saying plainly and economically what Auto-Owners claims it meant. The words are short and the meaning is straightforward. Instead of the inconsistent phrasing of "not . . . or . . . or . . .," it uses "neither . . . nor."

> The Liability Coverage provided for your automobile also applies to an automobile neither owned by you nor furnished nor available for your use. . .

The result is a clause that is plain, unambiguous, and easily understood. The difference between "not . . . or . . . or . . ." and "neither . . . nor" is discussed in detail on the next section, but even a

casual comparison of this example with the language that Auto-Owners chose demonstrates that it was never hard to **say** what Auto-Owners claims it **meant**. There is no need for elaborate circumlocutions. Simple, ordinary, everyday words do the job best.

F. Auto-Owners Faces No Hardship; It Can Re-Write the Clause.

One point that follows from these examples is that Auto-Owners' claim of catastrophe if this Court does not embrace its interpretation is vastly overblown. All Auto-Owners needs to do, if it loses here, is fix the bad language when it reissues its policies. The greater risk is from giving Auto-Owners language the imprimatur of this Court, leaving the bench and bar to make sense of similarly strangled syntax in future cases.

These examples also demonstrate that Auto-Owners' language cannot be made to mean what Auto-Owners claims. No amount of tinkering with the structure of the clause will change the result, as long as the same words are used. For example, suppose the clause were recast from its current form:

> a. The Liability Coverage provided for your automobile also applies to an automobile **not**:
>
> (1) owned by **or** furnished **or** available for regular use to you . . .

into

> a. The Liability Coverage provided for your automobile also applies to an automobile [that is]:
>
> (1) a. **not** owned by you **or**
>
> b. not furnished for regular use to you, **or**
>
> c. not available for regular use to you . . .

The result is the same. "Or" is still a disjunctive. "Or" still separates the three conditions that trigger coverage, and still makes these three conditions separate, so that each functions separately as

its own condition of coverage. If the automobile meets any one of the three separate conditions, there is coverage.

The solution for Auto-Owners is a simple one. It must write it policy so that the grammar of its clause and the plain meanings of the words it chooses reach the result it now claims that it intended. As is explained above in the examples, this is not difficult. The difficulty is in asking this Court to treat the words Auto-Owners chose as meaning something other than what they say.

II. BASIC DEFINITIONS AND RULES OF GRAMMAR DEMONSTRATE THAT AUTO-OWNERS' INTERPRETATION IS INCORRECT.

A. Under Accepted Rules of Grammar and Definition, Auto-Owners Covered the Vehicle.

The examples above demonstrate that there are several ways to say what Auto-Owners claims it meant. The fact that there are other formulations of language that actually say what Auto-Owners claims its policy says, does not necessarily demonstrate that Auto-Owners interpretation is wrong (though it supports an argument that the language is ambiguous).

But it is a logical possibility that even a poorly drafted clause can have only one meaning. The question, from that perspective, it not whether Auto-Owners said it *well*, but whether it said it *well enough.*

A grammatical and lexical analysis will demonstrate that it did not.

The problem with Auto-Owners language is easily stated: Auto-Owners used a **disjunctive** when a **conjunctive** was needed. To be more specific, Auto-Owners needed a formulation that included a "negating conjunction," *i.e.,* a conjunction that carries a negation forward to subsequent terms in a series.

To evaluate the Auto-Owners policy's actual language on its own terms, the tools are grammatical and lexical, *i.e.,* the function of the operative words in a sentence, and their definitions.

That is in effect what the Court of Appeals was doing, though it used demonstrative terms rather than references to treatises.

This analysis could be carried out with any of the examples in the previous section, but the simplest and most direct is to evaluate the difference between "not . . . or," and "neither . . . nor."

> a. The Liability Coverage provided for your automobile also applies to an automobile which is neither:
>
> (1) owned by nor furnished nor available for regular use to you . . .

The change of words changes the meaning. "Neither" is defined as "not the one or the other; not either." *American Heritage Dictionary,* Third Edition, p 1210 (exhibit D). "Nor" is defined as "not either." AHD p 1233 (exhibit E). The Usage Note at "nor" says that when it is used with "neither," it carries the negation over to the second element:

> "The traditional rule requires that *nor* be used following neither in expressions in which the negation is carried over to the second element: *he is neither able nor* (not *or*) *willing to go*." AHD p 1233 (Exhibit E, italics in the original, emphasis added).

If Auto-Owners had used this formulation the clause would have said what Auto-Owners claims it meant.

B. "Not" and "Or" Are Unrelated Terms, and "Or" Is Disjunctive, and Therefore Cannot Link a Negation to Subsequent Terms in a Series.

But Auto-Owners chose the simple negative "not" rather than "neither," and the disjunctive "or" rather than "nor." "Neither . . . nor" links the elements of a series and carries the negative forward to the second and third elements.

"Nor" joins, while "or" separates. "Nor" is linked to the preceding "neither." They are related terms, a pair: "neither . . . nor." By contrast, "not" is a simple negation. "Or" is a simple disjunctive. Neither "not" nor "or" is part of a pair. They have no logical relation to each other.

The American Heritage Dictionary defines "or" in this way: "Or" is "[u]sed to indicate an alternative usually only before the last term of a series. . ." and "[u]sed to indicate the second of two alternatives, the first being preceded by *either* or *whether*: *Your answer is either ingenious or wrong.*" AHD p 1271 (Exhibit F, italics in the original).

The Oxford English Dictionary agrees. It defines "neither" as "[i]ntroducing the mention of alternatives or different things, about each of which a negative statement is made." OED p 85-86 at microtype pp 1910-1911 (exhibit G). It defines 'nor' as "[c]ontinuing the force of a negative . . . and extending it to the corresponding word which follows." OED p 206 at microtype p 1941 (exhibit H). The Oxford English Dictionary defines "or" as "[a] particle coordinating two (or more) words, phrases or clauses, between which there is an alternative." OED p 166 at microtype p 2001 (exhibit I).

At the most basic level of grammatical and lexical analysis of the policy language, the analysis of the Court of Appeals is correct, though the court phrased it differently, using examples rather than definitions and rules of grammar. The opinion of the Court of Appeals recognizes that the use of "or" to separate the terms created **alternative** terms, and **alternative** conditions of coverage. In Appellee's original brief (p 11) he stated these alternative conditions as follows:

> The phrase "an automobile not" is separated from the three distinct characteristics which appear after the "(1)." Those three characteristics, in turn, are set apart from each other by the disjunctive "or," giving each a separate status. The effect is to define three classes of vehicles, each of which is a class of vehicle to which coverage is extended. The three classes are:
>
> 1. an automobile not owned by you
> 2. an automobile not furnished for regular use by you
> 3. an automobile not available for regular use by you.
>
> It is not disputed that the accident vehicle does not fit within classification 2 or 3, but does fit within classification 1.
> (Appellee's Brief p 11)

Thus, the simple application of grammatical construction and the meanings of the words that Auto-Owners chose to put in its policy, defeats Auto-Owners' argument. As noted in the beginning of this brief, Auto-Owners itself needed to use a relative pronoun phrase "that is" to explain what it thinks the clause means. In its application , Auto-Owners argues that the policy "does not cover the insured's use of her employer's vehicle that is regularly furnished or available for her use, even if the insured does not own that vehicle" (Auto-Owners' Application pp x-xi, emphasis added).

This formulation, submitted by Auto-Owners itself, is strikingly similar to the formulation that the Court of Appeals used, and which Auto-Owners challenges. The Court of Appeals opinion characterizes Auto-Owners' reading as:

> a. The Liability Coverage provided for your automobile also applies to an automobile not:
>
> (1) owned by and which are furnished or available for regular use to you . . .

(Opinion p 3)

There is no difference between "that is" and "which are." Both are conjunctions and both replace a disjunctive.

III. AUTO-OWNERS' INTERPRETATION MAKES SOME LANGUAGE MEANINGLESS.

Reading the clause from a common sense perspective leads to the same result. An automobile that is owned by the insured need not be "furnished" and is always "available for regular use," while an automobile that is "available" or "furnished" for the use of the insured is necessarily made available or furnished by someone other than the insured, and is therefore a vehicle the insured does not own.

To put it another way, if Auto-Owner's interpretation is correct, there is no difference in meaning if the phrase "owned by" is deleted.

> a. The Liability Coverage provided for your automobile also applies to an automobile not:
>
> (1) ~~owned by or~~ furnished or available for regular use to you . . .

This violates the principle that every term must have meaning. *Klapp v United Insurance Group Agency, Inc,* 468 Mich 459, 468; 663 NW2d 447 (2003).

Auto-Owners makes the opposite argument when it argues that a term is meaningless under Appellee's interpretation. The argument runs that if any non-owned vehicle is covered, then the language referring to vehicles furnished or made available is irrelevant, since those vehicles would almost certainly not be owned by the insured.

The first point is that if Auto-Owners' argument on this point is correct, then, and for the same reasons, so is Appellee's argument. In other words, the most that Auto-Owners can achieve by its argument is to show an ambiguity. Under its view, either "not owned by" or "[not] furnished" is unnecessary. In the first case, there is no coverage; in the second case there is. The resulting ambiguity must be resolved in favor of coverage. "[W]here an ambiguity exists, this Court will construe the policy in favor of the insured." *Arco Industries v American Motorists Insurance,* 448 Mich 395; 531 NW2d 168 (1995).

But the potential inconsistency can be resolved by reference to paragraph **c**. If the reference to a trailer is deleted and the second sentence is brought together, it reads:

> c. We do not cover:
>
> (1) the owner of the automobile.
>
> (2) an automobile used in your business or occupation or that of a relative, unless it is (a) a private passenger automobile; and (b) used by you . . ..

Apart from the application of **c(2)** as a separate source of coverage, as the trial court ruled, it also complements part **a**.

Part **c(1)** complements part **a** because **a** states that Auto-Owners insures the named insured when he is using a vehicle that is "not owned," while **c(1)** confirms that the owner of that vehicle is not an insured. Part **c(2)** complements part **a** in that it applies to each of the three categories in part **a**. A vehicle that is "not regularly furnished," a vehicle that is "not regularly made available" and a vehicle that is simply "not owned," all are subject to the limitation in **c(2)** for vehicles used in the insured's occupation.

It should be noted that part **c** also provides a separate basis for coverage, as is explained in Appellee's answer to the application for leave. Without repeating that argument here, two points deserve mention. First, part **c** is written separately with no words expressing a linkage to part **a**. Part **c** stands alone. Second, part **c** is written in the form of an initial negative ("we do not cover") coupled with an exception ("unless"). To borrow a concept from symbolic logic, "we do not cover unless" is the material equivalent of the affirmative statement "we do cover if." The term "unless" is an absolute term. In other words, the condition to which it refers is either satisfied or it is not; there is no middle ground. The term "if" is also an absolute term, because that condition is either satisfied or not.

Therefore, the text of part **c(2)** can only have one meaning: "We do not cover an automobile used in your occupation unless it is a private passenger automobile" necessarily means that "We do cover an automobile used in your occupation if it is a private passenger automobile." This statement exists separately from part **a** and has separate force.

IV. LEAVE SHOULD NOT BE GRANTED BECAUSE AUTO-OWNERS CAN RESOLVE ITS PROBLEMS BY AMENDING ITS POLICY.

This court should devote its resources to issues of broad public significance. An issue may have broad significance when it is based on facts that will occur often in the future. In this case the controlling **fact** is not the underlying fact that an employer made a car available to an employee. The only fact that determines the outcome of this case is the language that Auto-Owners chose for its policy. If the result in this case is adverse to Auto-Owners, as it should be, Auto-Owners can change the result by changing the language.

A ruling adverse to Auto-Owners will not expose it to drastic new underwriting risks. If Auto-Owners loses this case, within a few months it will have defined the problem out of existence by the simple expedient of doing what it should have done in the first place -- writing a better policy, following basic rules of grammar.

Even in this particular case, a decision adverse to Auto-Owners imposes no harsh or unfair result on Auto-Owners. Auto-Owners insured Mr. Wieczorek. Whether he was driving his own car on a personal errand or on company business, Auto-Owners insured him. If Mr. Wieczorek had been driving his own car on a company errand, he would have been covered. Auto-Owners cannot claim to be facing some unanticipated risk if he was instead driving his employer's car on that same errand. If Auto-Owners' complaint is that the employer's insurer should be primary and its own coverage excess, that is what "other insurance" clauses are for. As with the basic coverage language, Auto-Owners remains in full control of the risks it will assume. It needs only draft a policy that says so in plain language.

On the other hand, if this Court adopts Auto-Owners position, the consequences cannot be good, though how bad they will be is unknowable. To put it in basic terminology, if this Court rules for Auto-Owners, it will be on the premise, articulated or not, that "not . . . or" is the material

equivalent of "neither . . . nor" or any of the other examples given above in part I. It that happens, the interpretation of other policies where that ungrammatical construction is used will become problematic.

RELIEF REQUESTED

Appellee requests that this Court deny leave to appeal.

Respectfully submitted,

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October 26, 2005
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